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In The

Supreme Court of the United States

October Term, 1997

DOUGLAS MCARTHUR BUCHANAN, JR.,

Petitioner,

v.

RONALD J. ANGELONE, Director,
Va. Department of Corrections,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Is the Eighth Amendment right to be free from arbitrary and capricious imposition of the death penalty violated when the jury is not instructed regarding the existence of statutorily defined mitigating circumstances, despite defense counsel's request for such instructions, and where the jury charge is devoid of any reference to the concept of mitigation?

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BRIEF FOR PETITIONER

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported as *Buchanan v. Angelone*, 103 F.3d 344 (4th Cir. 1996), and is set forth in the joint appendix at 201-214. The opinion and order of the district court is unreported, and is set forth in the joint appendix at 87-200.

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1996. A timely Petition for Rehearing was filed on January 13, 1997. The order denying rehearing was entered on January 27, 1997, and is set forth in the joint appendix at 215. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or [shall] cruel and unusual punishments [be] inflicted;

This case also involves the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law . . .

STATEMENT OF THE CASE

The jurors who convicted Douglas Buchanan, Jr., of capital murder and sentenced him to death were never instructed by the court about their constitutional obligation to consider evidence in mitigation of punishment. This was prejudicial because the central issue for the jurors was not whether this nineteen year old had killed members of his family – no one disputed that. The issue was whether the relentless abuse of petitioner by his "family," torture which had mentally crippled him, was mitigating and provided support for a sentence less than death. Doug Buchanan's hope of avoiding a death sentence depended upon the jurors' constitutionally required, full consideration of this mitigation. This hope was dashed when the trial court refused all defense efforts to have the jurors instructed about the concept of, or even mention the word, mitigation.

The facts of the homicides, as set forth in the opinion of the Virginia Supreme Court, are as follows:

> The murders occurred in a two-hour time period between 3:30 p.m. and 5:30 p.m. on September 15, 1987. On that day, Buchanan and his wife, Christianne, drove to a spot on the Blue Ridge

> Parkway which was a ten-minute walk through the woods to Buchanan, Sr.'s home. They discussed the contemplated murders. Indeed, they had discussed the murders the previous day and had driven to Buchanan, Sr.'s home, but defendant decided, at that time, that he could not follow through with the plan to kill his family. On September 15, however, Buchanan left his wife, in their parked vehicle and, carrying a pair of rubber gloves and his .22-caliber rifle, walked through the woods to his father's house.
>
> Buchanan found his father outdoors behind the house. He explained his having the rifle by telling his father that he had been squirrel hunting. The two went inside where they engaged in conversation. They had a disagreement because Buchanan, Sr. made disparaging remarks about his first wife, defendant's deceased natural mother. Buchanan, Sr. charged that his present wife was unfaithful and that defendant's mother had been no better. Buchanan disputed the assertions about his mother. Buchanan, Sr. broke off the conversation and invited Buchanan outside to look at a recently purchased automobile. As Buchanan, Sr. walked towards the door, Buchanan placed the rifle to the back of his head and shot him. Buchanan, Sr. fell to the floor. Buchanan then placed the rifle to his father's forehead and shot him between the eyes. Next, Buchanan dragged his father's body into the master bedroom. He reached under his father's mattress and removed a .22-caliber pistol.
>
> Fifteen minutes later, Buchanan heard his brothers arriving from school. He stood waiting behind the living room door, rifle in hand. Donnie, who was ten years old, came in first and

walked past Buchanan who shot him in the back of the head. Buchanan then placed the rifle to Donnie's face and shot him near the right temple.

J.J., who was thirteen years old, heard the shots and started to run. Buchanan went outside to the porch and shot J.J. twice as he ran. He then helped J.J. walk inside the house where he shot him a third time, this time in the left side of the forehead. Buchanan dragged the bodies of both boys from the living room. J.J., however, despite his wounds, got up and walked back into the living room. Buchanan obtained a knife from the kitchen and stabbed J.J. five times. One stab wound pierced the skull and superficially penetrated the brain; another wound severed the carotid artery.

Buchanan waited inside the house until Mrs. Buchanan returned home. As she entered the house, he hid behind the front door. Once she was inside, he confronted her with the pistol aimed at her head. He pulled the trigger once, but the pistol did not fire. On his second attempt, the pistol fired; the bullet grazed the side of Mrs. Buchanan's head; she fell to her knees. He then took the knife he had used to kill J.J. and stabbed Mrs. Buchanan repeatedly. He stabbed her four times in her upper right chest. He slashed her throat from side to side, down to her vertebra column, severing the windpipe and all major veins and arteries in her neck. She also sustained defensive wounds to her hands.

Buchanan ran from the house through the woods to his parked vehicle. Along the way, he tossed his bloody tennis shoes and the knife into

a dumpster. As his wife drove him away, he tossed the rifle out of the window.

Buchanan v. Commonwealth, 384 S.E.2d 757, 760-61 (Va. 1989). J.A. 79-81.[1]

The intra-family nature of these homicides obviously increased their ugliness. But it might have presented another face as well, because the crime was the culmination of years of intense family turmoil. At trial, numerous lay witnesses, as well as defense and prosecution mental health experts, documented the dramatic and extraordinary power-keg in which Doug was raised and provided a detailed account of the traumatic loss, neglect and abuse that marked Doug's infancy, childhood and adolescence, all of which ended tragically with this crime, which occurred when Doug was only nineteen. Given the nature of the homicides, it was especially critical for the jury to be fully and completely instructed on the scope and meaning of mitigation, but it was not.

Doug was extremely close to his natural mother and her family. App. 90.[2] When Doug was two, his mother was diagnosed with breast cancer. This sad revelation began a long, debilitating and ultimately fatal battle with the disease. As a result of his mother's illness, Doug

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[1] As will be evident from petitioner's statement of the case, many of the above "facts," – e.g., the state court's assertion that he went to the house to kill his father – which are contained in the Virginia Supreme Court's opinion are inaccurate or misleading, and certainly are not fairly supported by the record as a whole.

[2] "App." refers to the joint appendix filed in the Court of Appeals.

spent most of his time with his grandparents and his aunt, whose homes adjoined his parents' home. J.A. 4-6. When Doug was nine, his mother's struggle with cancer ended; she was thirty-one years old. J.A. 5.

Within weeks of Doug's mother's death, his father began a sexual romance with his deceased wife's nineteen year-old first-cousin, Geraldine Patterson. J.A. 7. The two married several months later. *Id.* This union was met with strong disapproval from the surrounding relatives, especially on Doug's mother's side of the family. Doug was caught in the middle and was raised in "a tug of war," a victim of "a longstanding family feud" brought about by his mother's death. App. 217.

Soon after their marriage, Doug's stepmother and father initiated a relentless campaign to purge from their home any sign of Doug's natural mother. Doug was prohibited from mentioning his natural mother. Geraldine insisted on replacing all the furniture that belonged to the former Mrs. Buchanan and she systematically destroyed all photographs of her. J.A. 11. Emblematic of Geraldine's wicked campaign was her command that Doug watch as she burned pictures of Doug's mother. J.A. 3. Geraldine left no stone unturned. She even threw away one photo because she was sure Doug's mother's *legs* could be seen in the background. J.A. 4. Nothing was sacred. Personal memorabilia that had belonged to Doug's mother was confiscated and thrown away. Although these items were just threatening junk to Geraldine; Doug naturally cherished them. App. 97.[3] As a final torment, Doug was

[3] For example, Doug slept with his mother's rings until they were discovered and taken from him. App. 165.

actually forbidden from visiting his own mother's grave, which was only several hundred yards from Doug's home.[4] J.A. 13.

The next phase of the campaign was to isolate Doug from his mother's relatives. The steps Doug's father and stepmother took to accomplish this were extraordinary. They wired shut the gate that led from their property to the property of Doug's grandparents, and posted numerous "no-trespassing" and "keep out" signs on the chain link fence that divided the two properties. J.A. 4-5. Similar signs went up on the boundary facing Doug's aunt and uncle's home. *Id.* Geraldine and Buchanan, Sr. refused to allow Doug to play with his maternal cousins, or even talk to them while he waited with them for the school bus. App. 94-95, 100-02; J.A. 13-14. If his maternal cousins were expected to be present at church outings, Doug was not allowed to participate. J.A. 15-16. Doug was prohibited from attending his maternal grandmother's funeral. Any Christmas presents he received from his mother's relatives were promptly returned. J.A. 15. Any violation of these rules was severely punished.[5]

[4] Doug's father and stepmother repeatedly degraded his mother's memory, calling her a "whore" and barraging Doug with their accusations that she had been sexually promiscuous and unfaithful to his father. App. 36; 98; 114.

[5] When Doug was sixteen, his maternal grandparents brought a successful action for visitation rights. The court ordered that Doug be permitted to go to their house for several hours one day a week. The order did not, however, permit him to visit with any other maternal relatives. The scheduled visits were followed by repercussions at Doug's home.

As part of their agenda of emotional abuse, Doug's father and stepmother took great pains to impress upon him his inferior status in the new family. Doug, for example, was forbidden from participating in after-school activities; his half-brothers, however, were encouraged to do so. Doug was not permitted to get his driver's license until he was eighteen though one of his half-brothers received a car at age thirteen. App. 118. Witnesses described Doug, and correctly so, as a "prisoner" in his own yard, (App. 36), while his half-siblings were free to roam. When his father and stepmother returned from vacation, they would bring home gifts, but only for Doug's half-brothers. Doug received nothing.

When Doug was just eighteen, he joined the National Guard and married.[6] This added new turmoil to the equation. Geraldine now directed her contempt at Doug's new wife, blaming her for encouraging him to maintain contact with his maternal relatives. App. 38. Shortly after the marriage, Doug was hospitalized for an emergency appendectomy, and his maternal relatives gathered at his bedside. For allowing this visit, and for choosing to recuperate at his maternal aunt's house, Doug's father and stepmother stopped talking to him. App. 115. After recovering from his surgery, Doug learned that his wife was pregnant with their first child.

This history of traumatic loss and emotional abuse had devastating consequences. At the penalty phase of

[6] Doug's wife was two years older than he and had a history of emotional problems. Soon after their marriage she joined the Air Force but was rejected during basic training as "unfit." App. 38.

the proceedings, defense counsel called Dr. Robert Brown – a professor at the University of Virginia and one of a handful of people in the country who is both a psychiatrist and psychologist – to explain the effect on Doug of his natural mother's death, together with his stepmother's systematic effort to eradicate all memories of Doug's mother. According to Dr. Brown, children who lose their mothers before age ten are much more prone to suffer from mental disorders later in life than are other children, even if raised in a healthy home environment, which Doug was not. Emotionally, Doug never matured past the age of ten, and he suffered from depression throughout his teenage years. App. 175.[7] He frequently contemplated suicide. App. 42.

In regard to these crimes, Dr. Brown testified (as did Doug) that the situation came to a tragic head on a weekday afternoon when Doug went to his step-mother's house to try and "straighten things out" with her. Doug had recently become obsessed with the idea that he had to "resolve this festering [family] cancer." App. 226. He could not, he decided, allow his child to be raised in the same environment in which he had been raised. *Id.* Although he did not expect to find his father home from work, the two greeted each other cordially, and Doug tried to talk to his father about Doug's marriage. App. 117. His father, however, quickly turned the conversation

[7] Dr. Brown testified that Doug's I.Q. scores dropped ten points in the years after his mother's death. This unexpected, precipitous plunge was likely the result of Doug's emerging psychological problems. App. 168.

around to Doug's mother. App. 18. The familiar accusations that she was promiscuous and a "whore" returned. In the ensuing argument, Doug's father told Doug he had purchased a car for his favored thirteen year old half-brother, a revelation that, given the family's history, was clearly calculated to provoke. App. 118-19. As his father started to walk to the doorway, Doug shot him. He then killed his stepmother and half-brothers.

Dr. Brown testified that, at the time of the offense, Doug was acting under "extreme emotional stress," and that at times "he lost meaningful contact with reality." App. 174; 227. The Commonwealth's experts agreed that Doug had been severely abused – describing it as a "pathological relationship" (App. 232-33) – disagreeing only with Brown's ultimate conclusion that Doug had acted "under extreme mental or emotional disturbance."

The trial court instructed the jury regarding the single statutory aggravating circumstance upon which the Commonwealth relied: "vileness." J.A. 73.[8] With respect to mitigation, however, the trial court said nothing. *Id.* The sentencing jury remained ignorant not only of the meaning of mitigation in general, but also of the specific circumstances the Virginia Legislature deemed statutorily

[8] In Virginia, which is a non-weighing state, the jury first determines whether the prosecution has established one (or both) of the statutory aggravating factors for death eligibility: future dangerousness and vileness. *See Tuggle v. Netherland*, 116 S.Ct. 283, 284 (1995) (*per curiam*). If the jury does not find an aggravating circumstance, then it must impose a life sentence. If it finds one or both of the statutory aggravating circumstances, then the jury determines whether the defendant should be sentenced to death or to life imprisonment. *Id.*

relevant. *See* Va. Code § 19.2-264.4B. The substantial mitigating evidence presented at Mr. Buchanan's sentencing proceeding supported findings of three statutory mitigating circumstances: that the crime was mitigated (1) by his age; (2) by the fact that he had no significant history of prior criminal activity; and, (3) because he was acting "under the influence of extreme mental or emotional disturbance at the time of the offense."[9] The trial judge, however, denied petitioner's request that the jury be told about any of these statutory mitigating factors. J.A. 74-76. Moreover, the trial judge denied counsel's request that, in addition to the statutory mitigating factors, the jury be instructed to consider "the circumstances surrounding the offense, the history and background of Douglas McArthur Buchanan, Jr., and any other facts in mitigation of the offense." J.A. 74. Instead, the jury was given the threadbare instruction that:

[9] At the time of Mr. Buchanan's trial, the relevant part of the statute read as follows:

> Facts in mitigation may include, but shall not be limited to, the following: (i) the defendant has no significant history of prior criminal activity; (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; (iii) the victim was a participant in the defendant's conduct or consented to the act; (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; (v) the age of the defendant at the time of the commission of the offense.

Since Mr. Buchanan's trial, an additional mitigating factor – "(vi) mental retardation of the defendant" – has been added.

> If you find from all the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph [that the offense was vile], then you may fix the punishment of the Defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.

J.A. 73. The jury returned a verdict fixing the sentence at death,[10] and the trial judge imposed a death sentence.[11]

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[10] The verdict form, signed by the foreperson only, read as follows:

> We the jury, on the issues joined, having found the defendant guilty of capital murder by having wilfully, deliberately, and with premeditation killed Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan and Geraldine Patterson as part of the same transaction and having found unanimously that his conduct in committing the murders of the above four victims, or any one of them, was outrageously or wantonly vile, horrible or inhuman, in that it involves torture, depravity of mind or aggravated battery to the above four victims, or any one of them, and having considered the evidence in mitigation of the offense, we unanimously fix his punishment at death.

J.A. 77.

[11] In Virginia, the jury "fix[es]" the punishment, which is more than a recommendation but less than an imposition of sentence. *Frye v. Commonwealth*, 345 S.E.2d 267, 286 (Va. 1986). If the jury fixes the sentence at life, the trial judge must impose a life sentence. Va. Code Ann. § 19.2-264.4(A). If the jury fixes the sentence at death, the trial judge must order a probation officer to investigate the defendant's history and "any and all other relevant facts, to the end the court may be fully advised as to whether the sentence of death is appropriate and just." Va. Code Ann. § 19.2.-264.5. "After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of life imprisonment." *Id.* The court's discretion to set aside a death sentence is narrowly limited. *Frye*, 345 S.E.2d at 286.

On direct appeal, petitioner argued that the trial court's inadequate instruction as to mitigation violated the Eighth Amendment. The Virginia Supreme Court rejected this claim. According to the Virginia Supreme Court, the fact that a capital sentencing jury is told about the applicable statutory aggravating factors, but not about the applicable statutory mitigating factors, actually benefits capital defendants, because "[i]f the factors suggested in the statute were listed, the jury could be misled into concluding that those were the only factors it could consider in mitigation." *Buchanan v. Commonwealth*, 384 S.E.2d 757, 773 (Va. 1989) J.A. 84; *see also Clark v. Commonwealth*, 257 S.E.2d 784, 791 (Va. 1979).[12]

On appeal from the denial of the petition for writ of habeas corpus, the United States Court of Appeals for the Fourth Circuit held that Buchanan was not entitled to instructions explaining the concept of mitigation or identifying the statutory mitigating circumstances established by the Virginia General Assembly relevant to Mr.

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[12] The Virginia Supreme Court had also previously stated that apprising the jury to consider "*all* the evidence" is sufficient to inform the jury of the concept of mitigation and the constitutional duty to consider any mitigation presented. *LaVasseur v. Commonwealth*, 304 S.E.2d 644, 661 (Va. 1983).

Buchanan's case. *Buchanan v. Angelone*, 103 F.3d 344 (4th Cir. 1996). The Fourth Circuit concluded that the jurors understood the concept of mitigation and all that it encompasses, and had considered all the evidence presented in mitigation, simply because the word "mitigation" appeared in the pre-printed verdict form. *See Buchanan*, 103 F.3d at 347-48 (*citing Jones v. Murray*, 947 F.2d 1106, 1119-20 (4th Cir. 1991) J.A. 204-06; *Clozza v. Murray*, 913 F.2d 1092, 1105 (4th Cir. 1990); and *Briley v. Bass*, 750 F.2d 1238, 1244 (4th Cir. 1984)). To support its conclusion, the court of appeals relied on *Zant v. Stephens*, 462 U.S. 862, 890 (1983), which, the court observed, does "not require states to adopt specific standards for instructing juries on aggravating and mitigating circumstances," *Buchanan*, 103 F.3d at 347 (J.A. 204), even, according to the Fourth Circuit, when the state's instruction leaves the concept of mitigation completely out of the instructions.

This Court granted certiorari. J.A. 216.

SUMMARY OF ARGUMENT

The trial judge completely failed to provide the jury which sentenced Doug Buchanan to death with any guidance regarding its Eighth Amendment responsibility to consider the abundant evidence presented in mitigation of punishment. Despite the fact that the evidence supported the submission of several statutory mitigating factors, the trial judge refused both to inform the jury of the legislative mitigating criteria and to otherwise provide the jury with any definition or explanation of mitigation.

In fact, the word mitigation nowhere appears in the sentencing instructions.

Post-*Furman* Eighth Amendment jurisprudence requires that a capital sentencing jury be provided with sufficient legal guidance to enable it to consider the circumstances of the crime and character of the defendant; i.e., both the evidence in aggravation of punishment and the evidence in mitigation of punishment. In sum, the jury must be properly instructed regarding all facets of the sentencing process. In petitioner's case, the jury was provided no guidance regarding the mitigation side of the constitutional equation, and this failure rendered petitioner's death sentence arbitrary and unreliable in violation of the Eighth and Fourteenth Amendments.

The Virginia Supreme Court and the Fourth Circuit upheld this instruction on several erroneous bases. The state court reasoned that the failure to tender the statutory mitigating circumstances actually benefited petitioner, because the jury might then have believed it could not consider non-statutory mitigating circumstances. This assertion is misguided legally and factually, as it ignores the fact that petitioner's trial counsel requested an instruction which specifically informed the jury of its obligation to consider any non-statutory mitigating circumstances. The Fourth Circuit relied on the fact that the word mitigation was contained in the verdict form. However, this pre-printed form – signed only by the foreperson – was not part of the sentencing instructions, and the jury was not required to even review it. The court of appeals also relied upon language in this Court's opinions indicating that states are free to structure and shape the jury's consideration of mitigating evidence. The

instructions in this case, however, did no such thing. Rather, the combination of withholding the statutory mitigating factors and failing to explain the concept of mitigation turned the sentencing proceeding into an unregulated, arbitrary free-for-all. Finally, the fact that counsel was permitted to argue the evidence in mitigation is also irrelevant as this Court has long held that arguments of counsel are no substitute for a jury instructed in conformity with the Constitution.

ARGUMENT

I. THE FAILURE TO APPRISE THE SENTENCING JURY OF THE NATURE AND FUNCTION OF MITIGATION RENDERED PETITIONER'S DEATH SENTENCE ARBITRARY, CAPRICIOUS AND UNRELIABLE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The only part of the sentencing instructions which arguably referred to the jury's Eighth Amendment obligation to consider the substantial mitigating evidence presented by Mr. Buchanan's trial counsel was a single sentence which stated "[i]f you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment." J.A. 73. This scant, vague language did not convey to the jurors their duty to "consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of crime," *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989). Ensuring that sentencers consider mitigation is a constitutionally indispensable aspect of the Eighth Amendment's requirement that

the state devise capital sentencing schemes which are free from the risk of arbitrariness and capriciousness condemned in *Furman v. Georgia*, 408 U.S. 238 (1972).

This Court's "capital punishment cases under the Eighth Amendment address two different aspects of the capital decision making process: the eligibility decision and the selection decision." *Tuilaepa v. California*, 512 U.S. 967, 971 (1994). It is the second aspect of the process – the decision actually to impose or withhold a capital sentence – that is in issue in Doug Buchanan's case. As the Court has repeatedly held, "[w]hat is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (emphasis added).

In order to ensure that a capital sentencing jury makes such a determination, a State must

> (1) "confer on the sentencer sufficient discretion to take account of the 'character and record of the individual offender and the circumstances of the particular offense' to ensure that 'death is the appropriate punishment in a specific case,' " *Graham v. Collins*, 506 U.S. 461, 468 (1993) (*quoting Woodson v. North Carolina*, 428 U.S. 280, 304-305 (1976) (plurality opinion));
>
> *and*
>
> (2) "limit and channel the discretion . . . to ensure that death sentences are not meted out 'wantonly' or 'freakishly.' " *Gregg*, 428 U.S. at 270 (*quoting Furman v. Georgia*, 408

> U.S. 238, 310 (1972) (Stewart, J., concurring)); *see also California v. Brown*, 479 U.S. 538, 541 (1986) ("Sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses").

These principles are firmly established by a "long line of authority setting forth the dual constitutional criteria of precise and individualized sentencing." *Stringer v. Black*, 503 U.S. 222, 232 (1992). This long line of authority "seeks to reconcile two competing, and valid, principles in *Furman*, which are to allow mitigating evidence to be considered and to guide the discretion of the sentencer." *Johnson v. Texas*, 509 U.S. 350, 373 (1993).

The two halves of this dual imperative are necessarily in tension, *see, e.g., Graham*, 506 U.S. at 468; *Walton v. Arizona*, 497 U.S. 639, 656-674 (1990) (Scalia, J., concurring), and the States' constitutional obligation is to "accommodate[] *both* of [them]" in some responsible way. *Johnson*, 509 U.S. at 373 (*quoting Franklin v. Lynaugh*, 487 U.S. 164, 182 (1988) (plurality opinion) (emphasis added). The task is not overly difficult. Indeed, the large number of capital sentencing procedures which have passed constitutional muster in this Court attest to the fact that this task can be accomplished in many different ways. No single "right" form of death penalty statute satisfies the Eighth Amendment. *Spaziano v. Florida*, 468 U.S. 447, 464 (1984). Likewise, where a State chooses to make the life-or-death determination depend upon particular aggravating and mitigating circumstances, "the Constitution does not require a State to adopt specific standards for

instructing the jury in its consideration of [the] aggravating and mitigating circumstances." *Zant*, 462 U.S. at 890; *accord Tuilaepa*, 512 U.S. at 979.

What is required, however, is some reasonable accommodation of individualization with safeguards against arbitrariness. In the absence of such an accommodation, a capital defendant is either "deprived . . . of the individualized treatment to which he is entitled under the Constitution," *Parker v. Dugger*, 498 U.S. 308, 322 (1991), or "deprived of the precision that individualized consideration demands under the *Godfrey* and *Maynard* line of cases." *Stringer*, 503 U.S. at 222.[13]

To state these principles is all it takes to demonstrate the constitutional deficiency of the Virginia procedure under which Douglas Buchanan was sentenced to death. Far from accommodating controlled discretion with individualized consideration, this Virginia procedure does exactly the opposite: it makes no effort to provide guidance with respect to mitigation, thereby abandoning any effort to rationalize individualization, which in turn invites arbitrary and capricious sentencing. The *only* guidance given to Mr. Buchanan's jurors was that if they found an aggravating circumstance (beyond a reasonable doubt), then they

> may fix the punishment of the Defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall

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[13] The reference is to *Godfrey v. Georgia*, 446 U.S. 420 (1980), and sentencing standards that were "vague and imprecise, inviting arbitrary and capricious application of the death penalty." *Stringer*, 503 U.S. at 228.

> fix the punishment of the defendant at life imprisonment.

J.A. 73. Apart from no instruction at all, it is difficult to imagine a capital sentencing instruction *more* conducive to arbitrary application or *less* informative about the principle of individualization than this one.

In essence, this instruction tells jurors that they may do anything they please for any reason or no reason whatsoever, while at the same time withholding from them even the most modest explanation of what an individualized sentencing judgment means and entails, or how mitigation is to be appraised, compared to aggravation. The instruction does nothing to guide the jury's sentencing decision. So far as this instruction goes, once an aggravating circumstance is found, all concern for regular and rational decision making vanishes: if there is to be any basis for the choice of one punishment over another, the jury must invent it without benefit of law.

Post-*Furman* Eighth Amendment jurisprudence has been uniformly predicated on the supposition that "no longer can a . . . jury do as Furman's jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die. Instead, the jury's attention is directed to the specific circumstances of the crime. . . . *Gregg v. Georgia*, 428 U.S. 153, 197 (1976) (plurality opinion). In addition, "the jury's attention is focused on the characteristics of the person who committed the crime. . . . Are there any special facts about this defendant that mitigate against imposing capital punishment (*e.g.*, his youth, the extent of his cooperation with the police, his emotional state at the time of the

crime)." *Eddings v. Oklahoma*, 455 U.S. 104, 111 n. 6 (*quoting Gregg v. Georgia*, 428 U.S. at 197 (plurality opinion)). Capital sentencing jurors must be given "guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." *California v. Ramos*, 463 U.S. 992, 999-1000 (1983) (*quoting Gregg*, 428 U.S. at 192 (emphasis omitted)). "Clear and objective standards" that provide the jury with "specific and detailed guidance" are the touchstone of a constitutional capital sentencing procedure satisfying the Eighth Amendment's mandate of reliability.[14] *Godfrey v. Georgia*,

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[14] Since *Gregg*, 428 U.S. 153 (1976), this Court has recognized that due to the qualitative difference between the death penalty and a term of imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a particular case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *see also Sumner v. Shuman*, 483 U.S. 66, 72 (1987) ("*Furman* . . . relied to a significant degree on the unique nature of the death penalty and the heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case"); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"). The constitutional demand of reliability requires that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action," *Gregg*, 428 U.S. at 189, and "procedures must be followed that are designed to assure reliability in [capital] sentencing determinations." *Zant v. Stephens*, 462 U.S. 862, 874, (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (The Eighth Amendment requires "process that will guarantee, as much as is

446 U.S. 420, 428 (1980); *see also Profitt v. Florida*, 428 U.S. 242, 258 (1976) ("The requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty"); *Sumner v. Shuman*, 483 U.S. at 74 (1987) (*Furman's* basic requirement is "objective standards to guide, regularize and make rationally reviewable the process for imposing a sentence of death"). The purpose of these standards is to "serve both goals of measured consistent application and fairness to the accused." *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982).

Thus, when a State places the capital sentencing decision in the hands of a jury, the State must instruct the jury in clear, unambiguous terms which fully apprise the jury not only of its power to consider aggravating circumstances, but also of its obligation to consider all relevant mitigating evidence. *See Walton v. Arizona*, 497 U.S. 639, 653 (1990) ("[W]hen a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process"); *California v. Ramos*, 463 U.S. 992, 1000 (1983) (The jury must be given guidance "regarding the factors about the crime and the defendant that the State representing organized society, deems particularly relevant to the sentencing decision") (*quoting Gregg*, 428 U.S. at 176). Moreover, "the jury

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humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake") (O'Connor, J., concurring); *accord Lankford v. Idaho*, 500 U.S. 110, 125 (1991) ("[We have] emphasized the special importance of fair procedure in the capital sentencing context").

instructions – taken as a whole – must clearly inform the jury that they are to consider any relevant mitigating evidence about a defendant's background or character." *California v. Brown*, 479 U.S. 538, 545 (1986) (O'Connor, J., concurring); *see also Gregg*, 428 U.S. at 190 ("[a]ccurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die"). "[E]xcessively vague sentencing standards," with respect to aggravation or mitigation, "lead to [the] arbitrary and capricious sentencing patterns condemned in *Furman*." *California v. Ramos*, 463 U.S. at 1000. If the explanation of mitigation is "too vague," *Tuilaepa v. California*, 512 U.S. at 973, citing *Walton v. Arizona*, 497 U.S. 639, 654, or if the instructions do not give the jury an appropriate "vehicle" to consider the mitigation presented, *Penry*, 492 U.S. at 328, then the Eighth Amendment is violated.[15] *See also California v. Ramos*, 463 U.S. at 999 (Georgia statute approved in *Gregg* was constitutional because it required "instruction on the factors to be considered").

The instructions given to Doug Buchanan's jury violated each and every one of these well-established

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[15] This same basic point was reaffirmed by Justice Souter in his concurring opinion in *Simmons v. South Carolina*, 512 U.S. 154, 172 (1994) (Souter, J., concurring): "The same need for heightened reliability also mandates recognition of a capital defendant's right to require instructions on the meaning of legal terms used to describe the sentence (or sentencing recommendations) a jury is required to consider, in making a reasoned moral choice between sentencing alternatives." There can be no serious dispute that the concept of mitigation is a key – and in this case was the key – sentencing term.

principles. Assuming that the jury used any principles at all to reach its decision, it had to make them up as it went along. The instruction singularly and completely failed to inform the jurors that the Constitution requires them to consider in mitigation facts and circumstances that do not amount to an excuse or justification of the defendant's underlying criminal conduct. This notion is not self-evident, nor is it one that a juror would suppose, without being told, that the law contemplates. "Presentation of mitigating evidence alone, of course, does not guarantee that a jury will feel entitled to consider that evidence." *Boyde v. California*, 494 U.S. at 384 (1990). Precisely for this reason a jury must be given "a meaningful basis to consider the relevant mitigating qualities" of whatever evidence in mitigation is presented to it. *Johnson*, 509 U.S. at 369. One may not presume that a jury considered those qualities when mitigation is not mentioned in the jury instructions.

In *Johnson*, the Court sought and found the necessary mitigation instruction in the trial judge's submission to the jury of Texas' Second Special Issue, relating to future dangerousness *vel non*. Had an instructional basis not been constitutionally necessary, the *Johnson* Court would not have sought one as its sole ground for distinguishing *Penry, supra*, from *Johnson*. And had none been found, the admission of all of the mitigating evidence presented on Johnson's behalf would not have sufficed to render his death sentence constitutional, because that evidence would not have been brought "within 'the effective reach of the sentencer,'" *Johnson*, 509 U.S. at 368 (*quoting Graham*, 506 U.S. at 475-76). The sentencing jury would

have "had no reliable means of giving mitigating effect to that evidence." *Graham*, 506 U.S. at 475.

By failing to offer any explanation whatsoever of the constitutional concept of mitigation, the Virginia instruction at issue here embodies two constitutional vices. First, it "afford[s] no meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender." *Roberts [Stanislaus] v. Louisiana*, 428 U.S. 325, 333-334 (1976) (plurality opinion). Second, because it provides no such opportunity, it flouts *"Furman's* requirement that standardless jury discretion be replaced by procedures that safeguard against arbitrary and capricious imposition of death sentences." *Id.* at 334.

Because it is so clearly unconstitutional, the Virginia instruction here is, not surprisingly, unique. No other state uses this perverse capital sentencing procedure. No other state denies the jury access to the very concept of individualization that is a precondition for rational evaluation of mitigating evidence. No other state effectively tells jurors to choose life or death on whatever grounds, rational or irrational, they please.[16] Nor does Virginia's

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[16] *See, e.g., State v. Bey*, 548 A.2d 887, 910-11 (N.J. 1988) ("The requirement that capital sentencing must not preclude consideration of relevant mitigating circumstances would be hollow without an explanation of how the evidence can mitigate the imposition of the death penalty. Otherwise the court would subject the defendant to the risk of an arbitrary and capricious jury determination. . . . In sum, it is the trial court's duty to assure that a reasonable juror will understand the meaning and function of mitigating factors"); *Johnson v. State*, 439 A.2d 542, 562 (Md. 1982). ("Where . . . the sentencing authority fails to

unique procedure rest on any special local need or penological objective. It rests on no legislative determination of necessity (*or* propriety), nor would any discernible legislative policy be adversely affected if it were stopped. On the contrary, the Virginia legislature has expressly enumerated a set of "factors about the crime and the defendant *that the State, representing organized society, deems particularly relevant to the sentencing decisions.*" *Ramos*, 463 U.S. at 999-1000 (emphasis in original) (citing *Gregg*, 428 U.S. at 176). The constitutional rub, quite simply, is that the Virginia Supreme Court has mysteriously forbidden the State's trial judges to tell its juries anything about these factors. *See Clark v. Commonwealth*, 257 S.E.2d 784, 791 (Va. 1979); *LaVasseur v. Commonwealth*, 304 S.E.2d 644, 661 (Va. 1983).[17]

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indicate the existence of a factor commanded by the legislature to be considered in mitigation of the death penalty, it is manifest that the sentence was imposed in violation of the statutory design, thus compelling us to vacate it. Were the sentencing authority free to disregard the existence of a mitigating factor and impose sentence without considering it, the statute authorizing such arbitrary imposition of the death penalty would be rendered patently unconstitutional"); *see also* Appendix to Petitioner's brief.

[17] In the courts below, respondent asserted that Virginia's sentencing statute merely defines what evidence is admissible. This view, however, is inconsistent with the language and history of the statute. While the first two sentences of Va. Code Ann. § 19.2-264.4B refer to "evidence," without distinguishing between that which would and would not be favorable to the defendant, the next sentence not only refers just to mitigation, but it refers to "facts" rather than "evidence." ("Facts *in mitigation* may include, but shall not be limited to" the circumstances specified). Respondent's view also leaves unexplained the General Assembly's recent decision to add

The Virginia Supreme Court's sole rationale for this prohibition is that informing jurors about the concept of mitigation would lead them to mistakenly think that the specific mitigating circumstances enumerated in the Virginia statute were exclusive, which would violate the rule of *Lockett v. Ohio*, 438 U.S. 586 (1978). This justification is hollow, and doubly so in the present case. In the first place, it ignores the power (and obligation) of the presiding judge simply to tell the jury in no uncertain terms that the statutorily-enumerated mitigating circumstances are *not* exclusive – as is done in every other state that enumerates mitigating circumstances. *See, e.g., Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990). In the second place, it ignores the fact that in this case Buchanan's trial counsel drafted and submitted a proposed instruction telling the jury precisely that, and in constitutionally unimpeachable terms. J.A. 74.

In affirming the denial of the writ, the Circuit Court sought solace in the paltry fact that the jury verdict form, which only the foreperson signed, recited (among other

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mental retardation to the statute, or, for that matter, why the statute even exists, as the evidence whose admissibility it purportedly governs is evidence which can not be limited to the statutory factors consistent with the Constitution. Furthermore, respondent's interpretation is in conflict with the decisions of the Virginia Supreme Court indicating that the statute "provides a list of mitigating circumstances which the fact-finder is required to consider in *pari materia* with aggravating circumstances." *Smith v. Commonwealth*, 248 S.E.2d 135, 149 (Va. 1978), *cert. denied*, 441 U.S. 967 (1979); *see also Buchanan*, 384 S.E.2d at 773 (referring to "the mitigating factors mentioned in the statute").

things) that having found the defendant's conduct in committing the murders

> or any one of them, was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or any one of them, and *having considered the evidence in mitigation of the offense*, we unanimously fix his punishment at death.

(emphasis added). Any comfort derived from this boilerplate language is cold indeed. Even if this verdict form did not – as it does – convey the unmistakable message that mitigation is an after-the-fact technicality; even if it did not – as it does – have all of the hallmarks of meaningless and unimportant legalese; and even if the judge had instructed the jurors that they should read it before reaching their life-or-death verdict – which he did not – the verdict form would still fail utterly to give the jurors any hint or clue as to what the concept of mitigation is all about.

In its prior submissions, the Commonwealth has sought to defend the lack of guidance given to the jury in petitioner's case by referring to this Court's prior statements that states are free to structure and shape the jury's consideration of mitigating evidence "in an effort to achieve a more rational and equitable administration of the death penalty." *Walton v. Arizona*, 497 U.S. 639, 652 (1990); citing *Boyde v. California*, 494 U.S. 370, 374 (1990); *see also Johnson v. Texas*, 509 U.S. 350 (1993). The problem with this defense is that Virginia has not sought to "structure and shape" the jury's consideration of mitigating evidence at all. Quite the contrary. It has left the jury's

consideration of mitigation evidence completely *un*structured, *un*shaped and *un*informed. The instructions in Mr. Buchanan's case gave the jury no structure or guidance: by withholding the statutory mitigating factors, failing to explain mitigation and, indeed, not even mentioning the word "mitigation" in the instructions, the sentencing process essentially became the completely arbitrary and capricious, unregulated free-for-all which *Furman* forbids. Furthermore, what was necessary to bring petitioner's capital sentencing proceeding within the Eighth Amendment's ambit was *de minimis*. All the trial court had to do was provide the jury with the mitigating factors contained in the statute together with a brief instruction explaining what mitigating evidence is and the jury's obligation to consider it. *See, e.g., Blystone*, 494 U.S. at 305 (jury provided with a non-exclusive list of statutory mitigating facts and a "catchall" providing for the consideration of "any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense").

Imagine a scenario slightly different from what actually occurred at petitioner's trial. The lawyers discuss all the relevant sentencing considerations, including aggravation and mitigation. After hearing the arguments the trial judge informs the jury that "the lawyers' arguments pretty much summed it up. I don't see any need to instruct you further; please retire and decide whether the defendant should be sentenced to the death penalty or to life imprisonment." Surely the State would not contend, and this Court would not hold, that a death sentence resulting from a completely uninstructed jury satisfies the

Eighth Amendment's demand of reliability in capital sentencing. Yet, in many ways, an "instruction" of this sort would have been *better* than the charge given to petitioner's jury, because not only did the trial judge in petitioner's case (like the judge in the hypothetical) fail to highlight the jury's duty to consider the mitigating evidence presented, he *also* failed (unlike the judge in the hypothetical) to indicate in any manner that the arguments of counsel were correct statements of the relevant sentencing law.

Finally, it is unclear whether the Fourth Circuit also took some constitutional comfort from the circumstance that "Buchanan's counsel was permitted to discuss the [mitigating] factors in his closing argument." 103 F.3d at 347; J.A. 204. However, in *Taylor v. Kentucky*, 436 U.S. 478, 488-89 (1978), this Court held that "arguments of counsel cannot substitute for instructions by the court."[18] Similarly, in *Boyde v. California*, 494 U.S. at 384, this Court recognized that "[a]rguments of counsel generally carry less weight than do instructions from the court" because they are typically viewed as "statements of advocates." *Cf. Carter v. Kentucky*, 450 U.S. 288, 303-04 (1981) ("the trial judge has a powerful tool at his disposal – the jury instruction – and he has an affirmative constitutional

[18] In *Taylor*, the Court rejected the State's claim that an accurate instruction was unnecessary due to defense counsel's arguments because "[p]etitioner's right to have the jury deliberate solely on the basis of the evidence cannot be permitted to hinge upon a hope that defense counsel will be a more effective advocate . . . than the prosecutor will be. . . . It was the duty of the court to safeguard petitioner's rights, a duty only it could have performed reliably." *Id.* at 489.

obligation to use that tool when a defendant seeks its employment" regardless of defense counsel's ability to argue the matter).[19] There is no substitute for a sentencing jury instructed in conformity with the Eighth and Fourteenth Amendments, and the failure to instruct the jury in accordance with this Court's longstanding Eighth Amendment principles left it free "to roam at large with only its untutored instincts to guide it." *Carter v. Kentucky*, 450 U.S. at 301.[20]

[19] Furthermore, the trial judge instructed the jury that "the opening statements and the closing statements of the attorneys are intended to help you in understanding the evidence and applying the law, but what the attorneys say is not evidence." Tr. 621. Additionally, during his opening statement at the sentencing phase, the prosecutor asserted: "I hope that you realize . . . that lawyers sometimes use emotional appeals to try and sway juries. I ask you to restrain your considerations to the facts you have heard from the stand, what comes from here or off the screen or on the pictures. Deal with the evidence and not the craftiness of the lawyers." Tr. 1253. These comments also limited the significance of counsel's closing argument.

[20] The same result flows inexorably from *Lockett* and its progeny. In *Lockett v. Ohio*, 438 U.S. 586, 605 (1978), the Court acknowledged that "the *risk* that the death penalty will be imposed in spite of factors which may call for a less severe penalty. . . . is. . . . incompatible with the commands of the Eighth and Fourteenth Amendments." Precisely this risk is at work in petitioner's case. The sentencing instructions provide no assurance that the jury even understood the concept of mitigation, much less considered the mitigating circumstances which were presented. As this Court recognized in *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), "it is not enough to allow the defendant to present mitigating evidence to the sentencer. The

sentencer must also be able to consider and give effect to that evidence." *See also Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring) (A capital defendant has the right to "consideration of [mitigating] evidence by the sentencing authority"); *Mills v. Maryland*, 486 U.S. 367, 374-75 (1988) ("the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence"); *Boyde v. California*, 494 U.S. 370, 384 (1990) ("Presentation of mitigating evidence alone, of course, does not guarantee that a jury will feel entitled to consider that evidence"). It is irrelevant whether the barrier to the sentencer's consideration of mitigating evidence is the result of a state statute (*e.g., Lockett v. Ohio, supra*); jury instructions (*e.g., Mills v. Maryland, supra*); the sentencing court (*Eddings v. Oklahoma, supra*); or an evidentiary ruling (*Skipper v. South Carolina*, 476 U.S. 1 (1986)).

Penry is especially instructive because this Court recognized there that the "absence of instructions informing the jury that it could consider and give effect to the mitigating evidence" was the root of the Eighth Amendment violation in Penry's case. 492 U.S. at 328. The risk here is even greater than it was in *Penry* insofar as the jury here was not even made aware of its obligation to consider the mitigation presented. The term mitigation was never mentioned in any instruction, much less explained, and the discretionary nature of a Virginia jury's capital sentencing decision, unlike that of a jury guided by the Texas special issues, does not insure that the mitigating information which was presented entered into the jury's sentencing calculus. Thus there is no assurance that petitioner's jury took into account "factors which may call for a less severe penalty." *Lockett*, 438 U.S. at 605.

CONCLUSION

For the foregoing reasons, the decision of the United Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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APPENDIX

Survey of Jury Sentencing Capital Jurisdictions And Requirement for Instruction On Mitigating Circumstances

A review of the state jurisdictions that use jury sentencing in capital sentencing shows that nearly every one has concluded that the Eighth Amendment requires that sentencing juries receive instruction on mitigating circumstances. The practices of those states are summarized below:

1. **Alabama** (jury weighs aggravating and mitigating circumstances and recommends sentence; trial judge is final sentencer; sentencer typically receives thorough instruction on relevant aggravating and mitigating circumstances)

Case law

Cochran v. State, 500 So.2d 1161, 1173-1174 (Ala.Cr.App. 1984) (jury must be instructed that mitigating circumstances are those that do not justify or excuse the offense, but which, in fairness and mercy, may be considered as extenuating, or reducing the degree of moral culpability and punishment)

Pattern Instruction: Proposed Pattern Jury Instruction for Use in the Sentencing Phase of Capital Cases Tried Under Act No. 81-178, October, 1982, pp. 81-90. The following instruction is typically given prior to when penalty phase begins:

"An aggravating circumstance is a circumstance specified by law which

indicates, or tends to indicate, that the defendant should be sentenced to death. A mitigating circumstance is any circumstance that indicates, or tends to indicate, that the defendant should be sentenced to life without parole instead of death. The issue in this sentencing hearing concerns circumstances of aggravation and circumstances of mitigation that you should consider and weigh against each other in deciding what the proper punishment is in this case."

* * *

"The law of this state provides a list of some of the mitigating circumstances which you may consider. I will now read to you a list of some of the mitigating circumstances you may consider. These include: [7 statutory mitigating circumstances]"

"A mitigating circumstances does not have to be included in the list that I have read to you in order for it to be considered by you. In addition to the mitigating circumstances previously specified, mitigating circumstances shall include any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death."

2. **Arkansas** (jury weighs aggravating and mitigating circumstances prior to making sentencing decision; state supreme

court has long directed that juries receive instruction on relevant statutory aggravating and mitigating circumstances)

Case law

Miller v. State, 605 S.W.2d 430, 438 (Ark. 1980) (If there is any evidence of the aggravating or mitigating circumstance, however slight, the matter should be submitted to the jury)

See also *Sheridan v. State*, 852 S.W.2d 772 (Ark. 1993); *Dansby v. State*, 893 S.W.2d 331 (Ark. 1995).

Pattern Instruction: Arkansas Model Jury Instruction – Criminal: Form 2, Mitigating Circumstances:

[Requires jury to determine whether it unanimously finds each enumerated mitigating circumstance to exist; or whether one or more members finds the existence of each enumerated mitigating circumstance, or whether jurors agree unanimously that the enumerated mitigating circumstances does not exist.]

3. **California** (jury weighs aggravating and mitigating circumstances; trial court utilizes model instruction on mitigation and case law requires general instruction on non-statutory mitigating circumstances)

Case law

Cases requiring trial courts to instruct using model instruction: *People v.*

Easley, 671 P.2d 813 (Cal.1983); *People v. Brown*, 709 P.2d 440 (Cal. 1985). These cases find 8th Amendment requires such instruction.

Pattern Instruction: CALJIC 8.85 (California Jury Instructions Criminal)

[This pattern instruction charges the jury that it shall consider all evidence received during any part of the trial, and "shall consider, take into account and be guided by the following factors, if applicable:" (the statutory mitigating circumstances), and "any other circumstances that extenuate the gravity of the crime. . . . "]

4. **Connecticut** (jury weighs aggravating and mitigating circumstances; trial courts required to administer thorough instruction on mitigation; in 1990, statute required return of life sentence upon showing of one mitigating circumstance)

Case law

State v. Breton, 663 A.2d 1026, 1051 (Conn. 1995), on the basis of *Penry*, *Lockett* and *Blystone* concluded:

"In the present case, the trial court gave the defendant wide latitude to introduce mitigating evidence. Furthermore, the trial court's instructions accurately and thoroughly explained to the jury the nature of statutory and nonstatutory mitigating factors generally, emphasizing that the defendant had the right to present "the fullest

information possible concerning the defendant's character, background and history" and that the jury was obligated to give "full and fair consideration of all the mitigating evidence." See footnote 39. Finally, the trial court provided the jury with a detailed explanation of the statutory mitigating factors relating to whether the defendant's ability to conform his conduct to the law was significantly impaired and focused the jury's attention on the mitigating evidence with specific reference to the defendant's witnesses.

"We nevertheless are persuaded that the recounting of the claimed nonstatutory mitigating factors by the trial court may assist jurors in their consideration of the mitigating evidence. Accordingly, at the new hearing, the court should, if requested by the defendant, instruct the jury on each of the statutory and nonstatutory mitigating factors claimed by the defendant and, again, if requested, submit to the jury an accurate written list of those mitigating factors."

5. **Florida** (jury weighs aggravating and mitigating circumstances and makes sentencing recommendation; instruction on relevant statutory mitigating circumstances, as well as on non-statutory mitigating circumstances long required)

Case law

Stewart v. State, 558 So.2d 416, 420 (Fla. 1990) (new penalty trial required because trial court failed to instruct on impaired capacity statutory mitigating factor; " . . . an instruction is required on all mitigating circumstances 'for which evidence has been presented' and a request has been made.") *Jackson v. State*, 530 So.2d 269, 273 (Fla. 1988) (" . . . appellant argues that the standard jury instruction on mitigating circumstances, which included an instruction to the jury that it could consider any other aspect of the defendant's character or record, or any other circumstance of the offense, was inadequate. Further, appellant claims it was constitutional error for the trial court to refuse to instruct the jury according to a written list of nonstatutory mitigating circumstances prepared by appellant. We find these contentions without merit. Florida's standard jury instruction complies with the constitutional principles set forth in *Lockett v. Ohio*.")

Pattern Instruction: Penalty Proceedings: Capital Cases F.S. 921.141

[This instruction requires the court to advise the jury prior to commencement of the penalty phase that both sides may present evidence relevant to the aggravating and mitigating circumstances. Jury is told it will advise

judge on whether aggravating circumstances have been shown to exist and if so whether mitigating circumstances outweigh aggravating circumstances. After all the evidence is in, the jury receives instruction on any statutory mitigating factor for which evidence was presented as well as on nonstatutory mitigating evidence.]

6. **Georgia** (non-weighing state; if jury finds one statutory aggravating circumstance, it must then consider any other evidence in aggravation and mitigation in reaching sentencing determination; trial court must charge on mitigating circumstances; charge is available in pattern jury instruction)

Case law

Hawes v. State, 240 S.E.2d 833, 839 (Ga. 1977) ("The appellant argues . . . that the trial court erred in not charging the jury, in the absence of a request, on the law and existence of mitigating circumstances during the sentencing phase of trial. We hold the death penalty must be set aside for this reason, and for the additional reason that the trial judge's charge to the jury on aggravating circumstances was misleading. The trial judge did not instruct the jury that they should consider mitigating circumstances in arriving at their decision on the appropriate penalty to be imposed. This failure to inform the jury that they were

authorized to consider mitigating circumstances when there were mitigating circumstances authorized by law and warranted by the evidence was in contravention of requirements laid down in Code Ann. §§27-2534.1(b) and 27-2534.1(c). There are cogent reasons underlying this statutory requirement, for the United States Supreme Court has held in *Jurek v. Texas*, 428 U.S. 262, 271 (1976) that, 'in order to meet the requirements of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances.' ")

Moore v. Kemp, 809 F.2d 702, 731 (11th Cir. 1987) (*en banc*) ("Given Georgia's sentencing scheme, this circuit's case law has established that the eighth and fourteenth amendments require that the trial judge 'clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death.' ") (*See Peek v. Kemp*, 784 F.2d 1479 (11th Cir. 1986) (*en banc*))

Pattern Instruction: Council of Superior Court Judges, *Suggested Pattern Jury Instructions, Volume II, Criminal Cases*, (2nd ed. 1991), part 4(B)(13), pp. 81-82.

Prior to the commencement of the guilt phase, the judge is to instruct the jury that "if the jury determines that the accused is guilty, then the state

and accused both have a right to submit additional evidence in aggravation, or in extenuation and mitigation of the punishment to be imposed.

After receiving all evidence at the penalty phase, the jury is to receive the following instruction: "Members of the jury, the defendant in this case . . . has been found guilty of the offense of . . . and it now becomes your duty to determine, within the limits prescribed by law, what punishment will be imposed for this offense. In arriving at this determination, you are authorized to consider all of the evidence received here in court (in both stages of this proceeding), presented by the state and the defendant throughout the trial before you, unless the court has previously instructed you to consider certain evidence introduced by the state for a limited purpose, in which event such evidence shall not be considered by you in determining punishment. You shall also consider the facts and circumstances, if any, in extenuation, mitigation and aggravation of punishment. Mitigating or extenuating facts or circumstances are those which you, the jury, find do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame. Aggravating circumstances are those which you, the

jury, find increase the guilt or enormity of the offense, or add to its injurious consequences."

7. **Illinois** (jury must weigh aggravating and mitigating circumstances; has long used a pattern instruction that requires instruction on any statutory mitigating circumstance that is implicated by the evidence, and provides for additional catch-all instruction for non-statutory mitigating evidence)

Statutory law: 720 ILCS 5/9-1(c)

"The court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty."

Case law

People v. Davis, 447 N.E.2d 353, 377 (Ill. 1983) ("We have held that where the instruction requires the jury to consider all mitigating factors, the dictates of Lockett v. Ohio (cite omitted) are satisfied.")

People v. Spreitzer, 525 N.E.2d 30, 47 (Ill. 1988) ("Under the Federal Constitution, mitigating factors include 'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' In other words, any circumstances which suggest that the death

penalty would not serve the community's interest in deterrence or retribution is potentially mitigating. While the number of such possible mitigating factors is not infinite, it is certainly extremely large. Any list of such factors which is presented to the jury will always be open to the objections that it is incomplete and that it will tend to mislead the jury into thinking that they must limit themselves to the factors actually listed. Rather than requiring court and counsel to present the jury with a detailed laundry list of nonstatutory mitigation, we think it better to allow the court to instruct only on specific instances of statutory mitigation, while instructing the jury that they may consider any other nonstatutory mitigating factor.")

Pattern Instruction: Illinois Pattern Jury Instruction, Criminal IPI, Death Penalty Sentencing Instructions, 7C06, pp. 225-26.

"In deciding whether the defendant should be sentenced to death, you should consider all the aggravating factors supported by the evidence and all the mitigating factors supported by the evidence. Aggravating factors are reasons why the defendant should be sentenced to death. Mitigation factors are reasons why the defendant should not be sentenced to death."

[Committee Note – "The jury should be instructed on all statutory mitigating factors with any support in the evidence. Other statutory mitigating factors should be omitted."]

8. **Indiana** (jury advisory/judge sentencing weighing state; long-standing practice of trial court instructing jury on statutory mitigating factors; courts also give general instruction on non-statutory mitigating factors)

Case law

Baird v. State, 604 N.E.2d 1170, 1179 (Ind. 1992) ("[The instructions given] adequately convey[ed] not only examples of specific types of evidence that the jury may consider as mitigating but mandate that the jury consider any reason not to impose the death penalty, especially the character and history of the accused. The trial court did not commit error in refusing the tendered instruction.")

Pattern Instruction: Indiana Pattern Instruction No. 15.05. Death Penalty – Aggravating and Mitigation – Phase II. p. 348.

"[After instruction on aggravating circumstances, the instruction says,] You are also to consider the following mitigating circumstances: – [7 statutory mitigating factors and 1 catch-all]."

9. **Kansas** (jury sentencing weighing state; statute directs that jury must consider aggravating and mitigating circumstances)

Case law

State v. Walker, 845 P.2d 1, 21 (Kan. 1993) ("The trial court's instruction set forth the statutory mitigating factors claimed to be applicable and that the mitigating circumstances were not limited to those factors. Defense counsel was free to argue additional mitigating circumstances and tell the jury it could consider those circumstances in accordance with the court's instructions.")

Pattern Instruction: 56.00-B-G Capital Murder – Death Sentence – Death Proceeding

"B – The laws of Kansas provide that a separate sentencing proceeding shall be conducted when a defendant has been found guilty of capital murder to determine whether the defendant shall be sentenced to death. At the hearing, the trial jury shall consider aggravating or mitigating circumstances relevant to the question of the sentence."

D – [8 statutory mitigating circumstances and 1 catch-all]

10. **Kentucky** (weighing state/jury sentencing; long practice of jury receiving instruction on the statutory mitigating circumstances and a catch-all for the non-statutory mitigating circumstances)

Statutory law: Kentucky Penal Code 532.025

(b)(2) In all cases of offenses for which the death penalty may be

authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating or mitigating circumstances which may be supported by the evidence.

(3) The instructions as determined by the trial judge to be warranted by the evidence or as required by KRS 532.030(4) shall be given in charge and in writing to the jury for its deliberations.

Case law

Smith v. Commonwealth, 845 S.W.2d 534, 539 (Ky. 1993) ("In promulgating KRS 532.025(2) the legislators of Kentucky recognized the dire necessity of having jurors consider mitigating circumstances when the death penalty might be imposed. . . . The language of the statute clearly states that the judge shall include instructions to the jury regarding mitigating circumstances. The trial court's failure to do so constituted an error to the substantial prejudice of appellant.")

Pattern Instruction: Kentucky Instructions to Juries – 11.06 Mitigating Circumstances, pp. 302-303.

"In fixing a sentence for the Defendant for the offense of Murder, you shall consider such mitigating or

extenuating facts and circumstances as have been presented to you in the evidence and you believe to be true, including but not limited to such of the following as you believe from the evidence to be true: [8 statutory mitigating circumstances and 1 catch-all] In addition to the foregoing, you shall consider also those aspects of the Defendant's character, and those facts and circumstances of the particular offense of which you have found him guilty, about which he has offered evidence in mitigation of the penalty to be imposed upon him and which you believe from the evidence to be true."

Comment – "This instruction contains all of the mitigating circumstances listed in KRS 532.025(2)(b). The jury should be instructed only on those which are appropriate from the evidence, with the appropriate numbers inserted in the parentheses. Where the jury is instructed to consider other mitigating circumstances, as in the last listed factor, there is no requirement to specifically instruct the jury on additional mitigating factors introduced by the Defendant. *Halvorsan v. Commonwealth*, 730 S.W.2d 921 (Ky. 1986); *White v. Commonwealth*, 671 S.W.2d 241 (Ky. 1983)."

11. **Louisiana** (non-weighing state; after jury finds statutory aggravating circumstance, it must then consider mitigating circumstances)

Case law

State v. Flowers, 441 So.2d 707, 716 (La. 1983) ("The jury must receive clear instructions which not only do not preclude consideration of mitigating factors, *Lockett v. Ohio,* [cite omitted], but which inform the jury of its duty and authority to consider the qualities and characteristics of the individual offender and the circumstances of the particular offense. *Spivey v. Zant* [661 F.2d 464, 471 (5th Cir. 1981)]. We find that the trial judge clearly and concisely instructed the jury on mitigation and its authority to recommend against death. The judge read Code of Criminal Procedure article 905.5 to the jury, emphasized to the jury its authority to consider any other relevant circumstances, and handed the jury a copy of the lists of aggravating and mitigating circumstances. Any further attempt may only lead to juror confusion and further efforts to define the definitions.)

Pattern Instructions §7.03 Instructions for Capital Case Sentencing Hearing – Closing Instructions, pp. 116-117.

"You must now determine whether the defendant[s] should be sentenced to death or to life imprisonment without benefit of probation, parole or suspension of the sentence. You must consider the circumstances of the

offense[s] and the character and propensities of the defendant[s] in determining the sentence to be imposed."

"A. You are required to consider the existence of aggravating and mitigating circumstances in deciding which sentence should be imposed."

"D. Even if you find the existence of an aggravating circumstance, you must also consider any mitigating circumstances before you decide that a sentence of death should be imposed. The law specifically provides certain mitigating circumstances. They are: [7 statutory factors]. However, in addition to these specifically provided mitigating circumstances, you must also consider any other relevant mitigation circumstance. You are not limited to those mitigating circumstances which are defined. You may consider any other relevant circumstances which you feel should mitigate the severity of the penalty to be imposed."

12. **Maryland** (weighing state/jury sentencing; pattern instruction on mitigating circumstances; requirement of findings on mitigating circumstances)

Case law

Johnson v. State, 439 A.2d 542, 561-62 (Md. 1982) ("In order for this Court to determine that the death sentence was not arbitrarily directed but, rather,

resulted from the guided consideration required of the sentencing authority by section 413 as well as the federal constitution, adequate information concerning the sentencing decision must be revealed. Consequently, section 413(j) requires that the sentencing determination be unanimous, be in writing, and that it specifically state:

> (1) Which, if any, aggravating circumstances it finds to exist;
>
> (2) Which, if any, mitigating circumstances it finds to exist;
>
> (3) Whether any mitigating circumstances found under subsection (g) outweigh the aggravating circumstances found under subsection (d);
>
> (4) Whether the aggravating circumstances found under subsection (d) are not outweighed by mitigating circumstances under subsection (k); and
>
> (5) The sentence, determined in accordance with subsection (f) or (h).

"To further aid our review of the determination to impose the death penalty and in accord with the authority vested in this Court pursuant to section 413(l), we adopted Maryland Rule 772A. This rule provides for a standard form verdict sheet where the

sentencing body is required to indicate, by marking appropriate spaces, its consideration of each statutorily required step in the penalty determination process. [footnote omitted]. Moreover, the rule requires a detailed report by the trial judge providing additional information about the trial, the offense, the defendant, and the victim. All of this data thus provides the basis for our review of the jury's determination to end the life of the defendant."

"Where, as here, the sentencing authority fails to indicate the existence of a factor commanded by the legislature to be considered in mitigation of the death penalty, it is manifest that the sentence was imposed in violation of the statutory design, thus compelling us to vacate it. Were the sentencing authority free to disregard the existence of a mitigating factor and impose sentence without considering it, the statute authorizing such arbitrary imposition of the death penalty would be rendered patently unconstitutional [relying upon Furman v. Georgia, Gregg v. Georgia, Profitt v. Florida, and Jurek v. Texas]."")

13. **Mississippi** (weighing state/jury sentencing; instruction on statutory mitigators and general catch-all routinely given)

Statutory law

§99-101(3)(c): "In each case in which the jury imposes the death sentence,

the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section [statutory aggravating and mitigating circumstances] and upon the records of the trial and the sentencing proceeding."

§99-19-103: "The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation."

Case law

Neal v. State, 451 So.2d 743, 761 n.11 (Miss. 1984) (The use of such non-limiting "any other mitigating circumstances" instructions has been approved by this Court in *Gray v. State*, 375 So.2d 994, 1003-1004 (Miss. 1979) (approving instruction that jury was to consider as a mitigating circumstance "[a]ny other matter [besides the statutory mitigating circumstances] brought before you which you may deem mitigating on behalf of the defendant"). As a matter of practice, such language should be employed in every case to avoid this troublesome point arising in the future.) *See also Irving v. State*, 441 So.2d 846, 850-51 (Miss. 1983); *Clemons v. State*, 535 So.2d 1354, 1359-60 (Miss. 1988).

14. **Missouri** (weighing state/jury sentencing; statute requires instruction on mitigating

circumstances; uses pattern instruction)

Statutory law

§565.032.1 – "In all cases of murder in the first degree for which the death penalty is authorized, the judge in a jury-waived trial shall consider, or he shall include in his instructions to the jury for it to consider:

(2) Any of the statutory mitigating circumstances enumerated in subsection 3 of this section which are requested by the defendant and supported by the evidence.

(3) Any mitigating or aggravating circumstances otherwise authorized by law and supported by the evidence and requested by a party including any aspect of the defendant's character, the record of any prior convictions, and pleas and findings of guilty and admissions of guilt or pleas of nolo contendere of the defendant;"

Pattern Instruction – Missouri Pattern Instruction #313.44A

"If you unanimously find that the facts and circumstances in aggravation of punishment, taken as a whole, warrant the imposition of a sentence of death upon the defendant, you then must determine whether there are facts or circumstances in mitigation of punishment which are sufficient to

outweigh the facts and circumstances in aggravation of punishment. In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of trial."

"As circumstances that may be in mitigation of punishment, you shall consider [relevant statutory mitigating circumstances]. You shall also consider any other facts or circumstances which you find from the evidence in mitigation of punishment."

Case law

State v. Young, 701 S.W.2d 429, 437 (Mo. 1985) (en banc) (capital statute requires instruction on relevant statutory mitigating circumstance as well as on other mitigating evidence)

15. **Nevada** (weighing state/jury sentencing; jury routinely instructed on relevant statutory mitigating circumstances and catch-all)

Statutory law

§200.035 "Circumstances mitigating first degree murder. Murder of the first degree may be mitigated by any of the following circumstances, even though the mitigating circumstances are not sufficient to constitute a defense or reduce the degree of the crime: [6 statutory mitigating circumstances with catch-all]."

Case law

McCabe v. State, 655 P.2d 536, 538 (Nev. 1982) ("A plain reading of this statute in conjunction with NRS 175.554, which outlines the procedures for conducting a separate penalty hearing, reveals that a separate penalty hearing is not required where death is not an option for the jury to consider. NRS 175.554 provides that the court shall instruct the jury on all alleged aggravating and mitigating circumstances; then the jury is to determine whether the circumstances are found to exist.")

Bondi v. State, 699 P.2d 1062, 1066 (Nev. 1985) ("The penalty jury was correctly instructed to consider six specific mitigating factors and 'any other circumstances relating to the case or to the defendant, Mr. Biondi, as reasons for not imposing the death sentence.' ")

Nevius v. State, 699 P.2d 1053, 1061 n.6 (Nev. 1985) (catch-all instruction given approvingly: "However, the mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose the death penalty upon Mr. Nevius. You should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death

is not appropriate punishment in this case.")

16. **New Hampshire** (weighing state/jury sentencing; statutory command that jury consider statutory mitigating circumstances)

Statutory law

New Hampshire Revised Stat §630:5 Procedure in Capital Murder (VI) – "In determining whether a sentence of death is to be imposed upon a defendant, the jury shall consider mitigating factors, including the following: [8 statutory mitigating circumstances and a catch-all.]

17. **New Jersey** (weighing state/jury sentencing; detailed charge on mitigating circumstances required)

Case law

State v. Bey, 548 A.2d 887, 910-11 (N.J. 1988) ("The requirement that capital sentencing must not preclude consideration of relevant mitigating circumstances would be hollow without an explanation of how the evidence can mitigate the imposition of the death penalty. Otherwise, the court would subject the defendant to the risk of an arbitrary and capricious jury determination. *Gregg v. Georgia*, supra, 428 U.S. at 189. Even before enactment of the Act, we recognized that '[a]ppropriate and proper charges are essential for a fair trial' and that the charges 'should explain to the jury in an understandable fashion its function

in relation to the legal issues involved.' *State v. Green*, supra, 86 N.J. at 287, 430 A.2d 914. In sum, it is the trial court's duty to assure that a reasonable juror will understand the meaning and function of mitigating factors. A trial court is not bound to any particular language when instructing a jury on mitigating factors, but the court must adequately explain those factors 'in the text and purport of the whole charge.' . . . That requirement may be viewed as a corollary of the principle that 'faithful performance of the court's duty of expounding the law for the jury's guidance and instruction requires a plain and clear exposition of the issues.' ")

Pattern Instruction Excerpts from New Jersey Bench Manual for Capital Cases

The trial court must give clear instructions regarding the role that mitigating factors play in determining the penalty. *State v. Clausell*, 121 N.J. 298, 345 (1990) (merely explaining that the general function of mitigating factors are that they tend toward imposing a life sentence is insufficient)

The court must not merely quote from the statute when charging on mitigating factors . . . as jurors are untrained in interpretation.

[This manual includes a detailed instruction for *each* statutory mitigating factor as well as for the catch-all.]

18. **New Mexico** (weighing state/jury sentencing; clear pattern instruction on mitigating circumstances)

Statutory law

§31-20A-2. "Determination of sentence. A. Capital sentencing deliberations shall be guided by the following considerations: (1) whether aggravating circumstances exist as enumerated in Section 6 [31-20A-5 NMSA 1978] of this act; (2) whether mitigating circumstances exist as enumerated in Section 7 [31-20A-6 NMSA 1978] of this act; and (3) whether other mitigating circumstances exist."

Case law

State v. Clark, 772 P.2d 322, 339-40 (N.M. 1989) ("Clark argues that the refusal to submit to the jury his tendered instruction concerning specific *non*statutory mitigating circumstances was error. In capital cases the defendant is entitled to have the sentencing jury consider any relevant mitigating evidence. [cites omitted]. In this case, the jury was instructed pursuant to SCRA 1986, 14-7029 that it must consider 'all mitigating circumstances,' and that a 'mitigating circumstance is any conduct, circumstance, or thing which would lead you to decide not to impose the death penalty.' The instruction listed the statutory mitigating circumstances for which there was evidence, then instructed the jury that it must consider 'anything else

which would lead you to believe that the death penalty should not be imposed.' Finally, the jury was told to consider the 'character, emotional history and family history of the defendant which are mitigating.' ")

19. **New York** (weighing state/jury sentencing; court must charge on aggravating and mitigating circumstances, and jury must make findings as to each; there are no reported cases yet on this issue)

Statutory law

Criminal Procedure Law §400.27(10) – "At the conclusion of all the evidence, the people and the defendant may present argument for or against the sentence sought by the people. The people may deliver the first summation and the defendant may then deliver the last summation. Thereafter, the court shall deliver a charge to the jury on any matters appropriate in the circumstances. §400.27(11.b) – If the jury directs imposition of either a sentence of death or life imprisonment without parole, it shall specify on the record those mitigating and aggravating factors considered and those mitigating factors established by the defendant, if any."

20. **N. Carolina** (weighing state/jury sentencing; statute and case law require instruction on all mitigating factors – statutory and nonstatutory – that the jury would reasonably find)

Case law

State v. Lloyd, 364 S.E.2d 316, 323-24 (N.C. 1988) ("When evidence is presented in a capital case which may support a statutory mitigating circumstance, the trial court is mandated by the language in N.C.G.S. §15A-2000(b) to submit that circumstance to the jury for its consideration. Once the trial court determines that the jury could reasonably find a mitigating circumstance, the statute affords the trial court no discretion in submitting the mitigating circumstance. Our review of the issue is, therefore, limited to determining whether there was evidence in the present case which would support a reasonable finding of the mitigating circumstance of 'no significant history of prior criminal activity.' We conclude that in the case at bar such evidence was present and, under the mandates of N.C.G.S. §15A-2000(b), the trial court was correct in submitting this mitigating factor for consideration. . . . Allowing jurors to consider and weigh all of the statutory aggravating and mitigating evidence which they reasonably might find supported by the evidence is the only way to ensure that juries distinguish cases in which the death penalty properly may be imposed from those in which it may not be imposed."

"We now consider the defendant's argument that the trial court committed prejudicial error in refusing to submit the nonstatutory mitigating circumstances that the defendant had no prior record of capital offenses and that the defendant had not been convicted of a felony in the last ten years. Generally, a defendant is entitled to have a jury consider any circumstances that might have mitigating value. *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898 (1987). Our legislature ensured that a defendant would have the benefit of every circumstance having mitigating value by providing that the jury always consider, in addition to other statutory mitigating circumstances, '[a]ny circumstance arising from the evidence which the jury deems to have mitigating value.' ")

21. **Ohio** (weighing state/jury sentencing; long practice of instruction on statutory mitigating circumstances and catch-all)

Pattern Instruction – Ohio Jury Instructions – Criminal #503.016(A)

"You will consider all the evidence, arguments, (the statement of the defendant), (the pre-sentence report), (the mental examination report), and all other information and reports which are relevant to the nature and circumstances of the aggravating circumstance(s) . . . or any mitigating factors including but not limited to

the nature and circumstances of the offense and the history, character, and background of the defendant and all of the following: (statutory mitigating circumstances – 6 factors and 1 catch-all)

22. **Oklahoma** weighing state; court requires basic instruction on aggravating and mitigating circumstances)

Case law

Smith v. State, 737 P.2d 1206, 1215 (Okla. 1987) ("Appellant contends that neither Oklahoma statutes nor the trial court's instructions provided the jury particularized guidelines for considering mitigating circumstance and caused the sentence of death to be unconstitutionally imposed. The jury at trial was instructed in accordance with 21 O.S.1981 §701.11, that the death penalty could not be imposed unless they found that the aggravating circumstances outweighed the mitigating circumstances. They were further instructed that mitigating circumstances were those which in fairness and mercy could be considered as extenuating or reducing the degree of moral culpability. We have previously held, and now reaffirm our position, that these instructions are sufficient to prevent arbitrary or discriminatory application of the death penalty.")

Pattern Instruction – OUJI – CR 439, p. 81 (1981)

"Mitigating circumstances are those which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case."

23. **Oregon** (Interrogatory Texas-like sentencing system/jury sentencing; statute reformed to include a fourth question in wake of *Penry*)

Case law

State v. Wagner, 786 P.2d 93, 95, 99, 101 (Or. 1990) ("The statute does not state that these two issues (deliberateness & future dangerousness) and the one contingent issue (provocation) are the only issues that may be submitted to the jury. Indeed, although the statute only expressly provides for a mitigation instruction on future dangerousness, this court nevertheless has interpreted the statute to require the admission of mitigating evidence on all three issues *and* to allow for mitigation instructions on all three issues. *Wagner*, 305 Or. at 156-57, 161, 167, 752 P.2d 1136."

"We are thus left with circumstances in which (1) the federal constitution requires admission of all mitigating evidence; (2) the statute permits

admission of such evidence; (3) the federal constitution requires a mechanism for meaningful consideration of all mitigating evidence, including evidence beyond the scope of the statutory questions; (4) the statute permits arguments by defendant for life based on all mitigating evidence; (5) the trial court is obligated to instruct the sentencing jury on all necessary matters of law; and (6) defendant is entitled to an instruction that, notwithstanding an affirmative answer to the statutory questions, the jury may conclude that mitigating evidence justifies imposition of a life sentence."

"[In the wake of *Penry*, the Court redrafted a 4th question that had been hastily passed by the legislature to read as follows]: Should defendant receive a death sentence? You should answer this question 'no' if you find that there is any aspect of the defendant's character or background, or any circumstance of the offense, that you believe would justify a sentence less than death. In the fourth question posed above, we are asking the jury, in making its finding, to consider any mitigating aspect of the defendant's life, alone or in combination, not necessarily related causally to the offense. This does no more than to provide the sentencing jury with the data traditionally available to the sentencing

judge under the discretionary sentencing model for criminal cases.")

State v. Farrar, 786 P.2d 161, 189-190 (Or. 1990) ([Court sets out instructions to be used in future cases] "We disapprove defendant's second requested instruction that "the jury may bring back a life sentence even if no mitigating circumstances are found." At a minimum, we approve in substance defendant's first and third requested instructions, as follows:

> You may consider any aspect of defendant's life in your determination on the fourth question and any aspect of defendant's life that may be relevant in your determination of the first special issues.
>
> Defendant need not prove the existence of a mitigating circumstance beyond a reasonable doubt. If you reasonably believe that a mitigating circumstance exists, you may consider it as established."

"Additionally, pursuant to our opinion this date in *Wagner*, during the penalty phase the trial court must instruct each juror on the four issues set forth in ORS 163.150(1)(b), which statutory instructions may (but need not) read as follows:

> 1. Was the conduct of the defendant that caused the death of the

deceased committed deliberately and with the reasonable expectation that death of the deceased or another would result?

2. Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society? In determining this issue, you shall consider any mitigating circumstances offered in evidence, including, but not limited to, the defendant's age, the extent and severity of the defendant's prior criminal conduct and the extent of the mental and emotional pressure under which the defendant was acting at the time the offense was committed.

(If raised by the evidence)
3. Was the conduct of the defendant in killing the deceased unreasonable in response to the provocation, if any, by the deceased?

4. Should defendant receive a death sentence? You should answer this question 'no' if you find that there is an aspect of defendant's character or background, or any circumstance of the offense, that you believe would justify a sentence less than death.")

24. **Pennsylvania** (weighing state/jury sentencing; thorough pattern instructions requiring instructions on statutory mitigating circumstances and catch-all)

Case law

Commonwealth v. Cross, 496 A.2d 1144, 1152 (Pa. 1985) (Court rejects argument that statute erects mandatory scheme by distinguishing Ohio statute struck down in *Lockett*: "In contrast, by its thorough list of mitigating circumstances combined with the opportunity for the defendant to go beyond the listed mitigating circumstances and introduce any other evidence in mitigation, the Pennsylvania Death Penalty Statute clearly meets the requirements of the Eighth and Fourteenth Amendments by providing the sentencing authority with the means to give an individualized sentence which considers the character and record of the defendant and the circumstances of his offense.")

Pattern Instructions (December 1988)

15.2502E Death Penalty, Instruction Before Hearing

"(2) The sentence you will impose will depend on whether you find any of the things that the Pennsylvania Sentencing Code calls aggravating or mitigating circumstances. Loosely speaking, aggravating circumstances are things about the killing and the

killer which make a first degree murder case more terrible and deserving of the death penalty while mitigating circumstances are those things which make the case less terrible and less deserving of death. . . . "

"(3) It may be helpful to have in mind some of the things that the Pennsylvania Sentencing Code says are aggravating and mitigating circumstances. (*Enumerate potentially relevant aggravating and mitigating circumstances*). Mitigating circumstances also include any other mitigating matters concerning the character and record of the defendant or the circumstances of his offense."

15.2505F Death Penalty, General Instruction

(1) [repeats general definition of aggravating and mitigating circumstances]

"(4) In this case, under the Sentencing Code, the following matters, if proven to your satisfaction by a preponderance of the evidence, can be mitigating circumstances: *Here the court should state the mitigating circumstances raised by the evidence. For suggestions see Instruction 15.2502G. The court should routinely include the following statement of the catch-all category:* Any other mitigating matter

concerning the character and record of the defendant or the circumstances of his offense (including but not limited to ___)."

15.2502G Death Penalty, Stating Aggravating and Mitigating Circumstances

"The court should use the statutory language when stating aggravating and mitigating circumstances as part of the subdivision (3) of Instruction 15.2502E, or subdivisions (3) and (4) of Instruction 15.2502F."

15.2502G Jury Sentencing Verdict Slip

[In paragraph 2, the court submits "the following mitigating circumstance(s) (is)(are) submitted to the jury and must be proved by the defendant by a preponderance of the evidence (list and number separately)."

25. **S. Carolina** (nonweighing state/jury sentencing; statute includes statutory mitigating circumstances and requires court to instruct on those circumstances raised by the evidence)

Statute

§ 16-3-20(c) "The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any of the following statutory aggravating

and mitigating circumstances which may be supported by the evidence: [10 statutory mitigating circumstances] The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation."

Case law

State v. Pierce, 346 S.E.2d 707, 710 (S.C. 1986) ("Pursuant to Section 16-3-20(C), the trial judge shall instruct the jury as to those statutory mitigating circumstances which may be supported by the evidence. The trial judge is not to be concerned with the weight of the evidence, but only with the existence of the evidence. [cite omitted] In this case, the trial judge was required by law to instruct the jury on statutory mitigating circumstances 2, 6, and 7, given the evidence showing Pierce was using drugs and extremely intoxicated during the commission of the crime.")

State v. Linder, 278 S.E.2d 335, 339 (S.C. 1981) ("Section 16-3-20(C) of the statutory complex provides that when a capital case is heard by a jury, the trial judge must, in his sentencing instructions, include 'any mitigating circumstance otherwise authorized or allowed by law and any . . . statutory aggravating and mitigating circumstances which may be supported by the evidence.' . . . The purpose here is

to assure that each sentence rendered in a capital case results from the attention of the sentencing authority having been drawn to the particularized circumstances of each case.")

26. **S. Dakota** (nonweighing state/jury sentencing; no list of statutory mitigating circumstances but clear statutory command that jury be instructed on mitigating circumstances)

Statute

§ 23A-27A-1. "Mitigating and aggravating circumstances considered by judge or jury. Pursuant to §§ 23A-27A-2 to 23A-27A-6, inclusive, in all cases for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances and any of the following aggravating circumstances which may be supported by the evidence:"

§ 23A-27A-3. "Jury to determine existence of mitigating or aggravating circumstances – Instructions to jury. Upon the conclusion of the evidence and arguments of counsel, the judge shall give the jury appropriate instructions and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in § 23A-27A-1 exist. The instructions as determined by the trial judge to be warranted by the evidence shall be

given in his charge and in writing to the jury for its deliberation."

27. **Tennessee** (weighing state/jury sentencing; state case law requirement of instruction on both statutory and nonstatutory mitigating circumstances)

Statute

§ 39-13-204(e)(1) "After closing arguments in the sentencing hearing, the trial judge shall include in the instructions to the jury to weigh and consider any of the statutory aggravating circumstances set forth in subsection (i) which may be raised by the evidence at either the guilt or sentencing hearing, or both. The trial judge shall include in the instructions for the jury to weigh and consider any mitigating circumstances raised by the evidence at either the guilt or sentencing hearing or both which shall include, but not be limited to, those circumstances set forth in subsection (j). No distinction shall be made between mitigating circumstances set forth in subsection (j) and those otherwise raised by the evidence which are specifically requested by either the state or the defense to be instructed to the jury."

Pattern Instruction

Tennessee Pattern Instruction – Crim. 7.04(b)

Mitigating Circumstances: "Tennessee law provides that in arriving at the punishment, the jury shall consider as

previously indicated, any mitigating circumstances which shall include, but are not limited to, the following: [8 statutory mitigating circumstances and #9 the catch-all] – any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing; that is, you shall consider any aspect of the defendant's character or record, or any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence. No distinction shall be made between mitigating circumstances one (1) through eight (8) and those other which are specifically requested by the state or defense."

Case law

State v. Miller, 771 S.W.2d 401, 404 (Tenn. 1989) ("This Court has held that only those mitigating circumstances that are raised by the evidence are to be expressly charged. *See State v. Hartman*, 703 S.W.2d 106 (Tenn. 1985); *State v. Black*, 670 S.W.2d 600 (Tenn. 1984).")

28. **Texas** (jury is directed to answer interrogatories and to consider mitigating evidence therein)

Case law

Penry v. Lynaugh, 492 U.S. 302 (1989) (instruction on mitigation required

whenever mitigating evidence has relevance beyond scope of the special issues)

Gribble v. State, 808 S.W.2d 65, 75 (Tex.Ct.Crim.App. 1990) ("whenever a capital defendant produces evidence of his own character, background, or the circumstances surrounding his offense which, according to contemporary social standards, has a tendency to reduce his moral culpability in a way not exclusively related to the deliberateness of his criminal conduct, the provocative behavior of his victim, or the probability of his future dangerousness, the United States Constitution forbids the imposition of the death penalty upon him by a sentencer given no means to prescribe, based on such mitigating evidence, a less severe punishment.")

29. **Utah** (non weighing state/jury sentencing; statute includes statutory mitigating circumstances)

Case Law

Gardner v. Holden, 888 P.2d 608, 614 (Utah 1994) ("The trial court instructed the jury on all but three of the statutory mitigating circumstances. . . . There was no factual basis for any of these mitigating circumstances; there was no fundamental unfairness on this issue.")

30. **Washington** (weighing state/jury sentencing; case law requires instruction on relevant statutory mitigating circumstances and catch-all)

Case law

State v. Bartholomew, 683 P.2d 1079, 1089 (Wash. 1984) (reading list of statutory mitigating circumstances as helpful examples of mitigation sufficient under Eighth Amendment)

State v. Jeffries, 717 P.2d 722, 736 (Wash. 1986) (trial court's instruction on mitigation: "a mitigating circumstance is a fact about the offense, or about the defendant, which in fairness or mercy, may be considered in extenuating or reducing the degree of moral culpability and punishment, although it does not justify or excuse the offense" was not error)

State v. Gentry, 888 P.2d 1105 (Wash. 1995) (preferred manner of instructing on mitigating circumstances is to include whatever statutory mitigating factors the defendant requests be included in the instructions, but not include specific non-statutory factors)

Pattern Instruction

WPOC 31.07 Mitigating Circumstances – Definition

"A mitigating circumstance is a fact about either the offense or about the defendant which in fairness or in

mercy may be considered as extenuating or reducing the degree of moral culpability of which justifies a sentence of less than death, although it does not justify or excuse the offense. The appropriateness of the exercise of mercy is itself a mitigating factor you may consider in determining whether the State has proved beyond a reasonable doubt that the death penalty is warranted. You may also consider as mitigating circumstances any other factors concerning the offense or the defendant that you find to be relevant, including, but not limited to, the following: [statutory mitigating circumstances]"

31. **Wyoming** (weighing state/jury sentencing; statute requires instruction on mitigating circumstances)

Statute

§ 6-2-102(d) "Upon conclusion of the evidence and arguments the judge shall give the jury appropriate instructions, including instructions as to any aggravating or mitigating circumstance, as defined in subsection (h) and (j) of this section. . . . "

Case law

Hopkinson v. State, 632 P.2d 79, 157, 167 (Wyo. 1981) ("Section 6-4-102(h) specifically limits the aggravating circumstances to those listed, while subsection (j) merely states that 'mitigating circumstances shall be the

following.' This means that the jury is free to consider other mitigating factors. And in this case the jury was so instructed.") ("We would also suggest that the district court instruct the jury that if they find 'other' mitigating circumstances besides those specifically spelled out, that they must articulate it so as to aid this court in determining whether any arbitrary factors have been present in the sentencing process.")